Supreme Court, U. S.
FILED
JAN 8 1981
MICHAEL RODAK, JR., CLERK

NO. 80-763

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

JERRY LANE JUREK,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

ANITA ASHTON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT IN FURTHER SUPPORT OF GRANTING THE WRIT 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases **Page**

Louis v. Blackburn, 530 F.2d 1105 (5th Cir. 1980) 3

Milton v. Wainwright, 407 U.S. 371 (1972) 6

Miranda v. Arizona, 384 U.S. 436 (1965) 4

Procunier v. Atchley, 400 U.S. 423 (1971) 1,2

Constitutions, Statutes, and Rules

U.S. Const. amend. V. 4

U.S. Const. amend. VI 4

U.S. Const. amend. XIV 4

28 U.S.C. §2254(d) 1,2,3

17.1(a), Rules of the Supreme Court 5

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, by and through his attorney of record, the Attorney General of Texas, and files this Reply to Respondent's Brief in Opposition.

ARGUMENT IN FURTHER SUPPORT OF GRANTING THE WRIT

I.

The first question presented in the petition for certiorari is "whether the threshold requirements of 28 U.S.C. §2254(d) must be met before voluntariness of confessions may be considered." Respondent asserts in the brief in opposition that Petitioner has never before raised this argument. In Respondent-Appellee's Suggestion For Rehearing En Banc at 15-16, filed in the Court below, this argument was raised by Petitioner Estelle. In part, that argument said

> Petitioner [Jurek] presented no new evidence that was not presented to the state courts. There is no reason to infer that the state courts did not apply the correct criteria in finding Jurek's confession voluntary on the facts in evidence. *Procunier v. Atchley*, 400 U.S. 423 (1971).

That brief went on to quote from *Procunier v. Atchley*, 400 U.S. at 452, that "unless the result of the habeas corpus proceeding turns on disputed issues of historical fact, a rehearing on the issues of involuntariness of a defendant's incriminating statement would be an exercise in futility. . ."

This argument was presented in greater detail in the Supplemental Brief for Respondent-Appellee Rehearing En Banc at 16-19, which stated in part:

> Respondent does contend, however, that the fact findings of the state court and the federal district court are correct and are supported by the record and that the proper constitutional standard was applied to these fact findings. *Procunier v. Atchley*, 400 U.S. 446 (1971).
>
> Petitioner would have this Court overturn valid fact findings on the basis of inuendo and eloquent argument rather than on evidence. The burden of proof does not shift to the Respondent to prove the confession voluntary absent *prima facie proof* of involuntariness. 28 U.S.C. §2254(d).

These issues were raised in the court below. As pointed out in the brief in that court, Jurek's application for writ of habeas corpus did not plead any facts previously undeveloped in the state courts which would entitle him to relief. The evidence presented at the evidentiary hearing by Jurek's attorneys was merely cumulative of the evidence produced at state hearings. Nothing was presented to refute the fact findings of the state courts. The only evidence presented by Jurek at the federal evidentiary hearing was further testimony of psychological testing. The results of those tests were virtually identical to the results of the psychological testing presented at Jurek's state trial. Jurek did not take the stand, nor has he ever taken the stand, to testify that his confessions were in any way involuntary. No new evidence showing coercion was presented. Although the court below gave emphasis to the fact that Jurek's family never visited him, not one member of Jurek's family has ever testified that they wanted to visit Jurek or that they were kept from visiting Jurek by law enforcement officials.

Jurek did not establish the existence of any of the circumstances set forth in 28 U.S.C. §2254(d)(1-8). Further, Jurek did not meet the burden upon him to establish by convincing evidence that the factual deter-

mination by the state court was erroneous. Therefore, certiorari should be granted to consider the applicability of 28 U.S.C. §2254(d) in the context of this case.

II.

The second question presented for review in the petition for writ of certiorari is, "What is the proper standard for review on habeas corpus of voluntariness of confession? Should the 'independent review' or the 'clearly erroneous' standard be applied to the findings of the state courts and federal courts?" As is reflected by the five opinions written by the en banc court, the judges themselves were unable to agree on the proper standard for review. Admittedly, the eleven judges who found both confessions to be voluntary and admissible ultimately applied the independent review doctrine in that they found the confessions voluntary even when the broader standard was applied. 623 F.2d at 962. However, the fact of disagreement as to the standard among the twenty-four judges of the Court of Appeals points dramatically to the need for this Court to grant certiorari and clearly set forth the standard to be applied by the lower federal courts in the context of a habeas corpus case attacking the validity of a state conviction. Contrary to the allegations in the brief in opposition, a real disagreement does exist as to the proper standard of review. As recently as November 19, 1980, a panel of the Court of Appeals for the Fifth Circuit held that the clearly erroneous standard was the proper standard for review in a habeas corpus action. *Louis v. Blackburn*, 530 F.2d 1105 (5th Cir. 1980). Therefore, certiorari is proper as to the second question presented.

III.

The third question presented is as follows: "Does the Sixth Amendment require appointment of counsel during interrogation when the defendant repeatedly disavows a desire for counsel?" The opinion of Judge

Garza, which served as the majority opinion (although joined only by three other judges), found that "the authorities should have ignored the waiver of immediate assistance and acted on Jurek's *latent* expression of 'need' for counsel..." (623 F.2d 929, 941; A-24)(emphasis added). That opinion further stated:

> When Jurek's limited intelligence is factored into our consideration, it becomes evident that he could not have understood the gravity of his act *in the absence of legal counsel.* No court-appointed attorney worth his salt would have allowed Jurek to sign the second confession. (623 F.2d 929, 941; A-24)(emphasis added).

That opinion initially found that *Miranda v. Arizona*, 384 U.S. 436 (1965) had been complied with. (623 F.2d 929 at 939; A-19). But then the court went on to conclude that Jurek's second confession was involuntary because he did not have counsel. (623 F.2d 929, 941; A-24). Since this "latent" need for counsel was found to be the determinative factor for the involuntariness of the second confession, this issue of right to counsel is properly before this Court. The opinion of Judge Garza indicates that counsel must be appointed to advise a defendant in a capital murder trial whether or not he waives his right to counsel before signing any confession. Certiorari should be granted in this case to determine whether or not such a defendant is entitled to appointment of counsel in spite of his expressed desire not to have counsel.

IV.

The fourth question presented is the following: "Were the constitutional standards of the Fifth, Sixth and Fourteenth Amendments correctly applied to the undisputed facts in this case?" Respondent Estelle strongly believes that the opinion of Judge Brown, joined by ten other judges of the Fifth Circuit, was

correct in its application of the law to the undisputed facts in this case. However, because of the nature of the opinions in this case, in which the court cannot agree which confessions are voluntary and which are involuntary, the State is left in a peculiarly unfair position for any retrial. Absent a clarification of the voluntariness of the confessions at issue in this case, the State is faced with endless litigation in this case. If Jurek is retried and his first written confession, which was found to be voluntary by a majority, is admitted at his trial, there is the distinct possibility that the voluntariness of that confession will be relitigated not only through the state courts but again through the entire court system. The uncertainty and conflict created by this series of opinions is such as to call for the exercise of this Court's power of supervision. Rule 17.1(a), Rules of the Supreme Court. Certiorari should therefore be granted to clarify the issue of voluntariness of the confessions in this case.

V.

The final question presented for review is, "If a voluntary confession supports the jury verdict beyond a reasonable doubt, is the admission of an additional involuntary confession harmless error?" The Court of Appeals held Jurek's first written confession to be voluntary and admissible. In that confession he admitted taking Wendy Adams from the swimming pool and choking her and throwing her body in the river. This confession, when coupled with the evidence that Wendy Adams had been seen screaming for help in the back of Jurek's pick-up and the other evidence at trial provided overwhelming evidence of Jurek's guilt for the crime of capital murder committed in the court of kidnapping, even excluding the second written confession. The second count of the indictment as to attempted rape was supported only by the second confession, which was held to be inadmissible. However, since Petitioner could and did receive a death sentence

for the crime of capital murder during the course of committing kidnapping, the evidence, excluding the second confession, was more than sufficient to support the verdict. A review of the record leaves no reasonable doubt that the jury would have reached the same verdict without the second written confession. The kidnapping and murder of a helpless 10-year-old child is generally considered by society as one of the most heinous crimes which can be committed. Under the standard set forth in *Milton v. Wainwright*, 407 U.S. 371 (1972), the admission of the second confession, if admission of such confession was indeed error, should be held harmless beyond a reasonable doubt.

CONCLUSION

Therefore, for the reasons set forth in Petition for Certiorari and the arguments set forth in this reply to the Brief in Opposition, certiorari should be granted to consider all of the points raised in the Petition for Writ of Certiorari.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

ANITA ASHTON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent